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# Nantucket Sound Offshore Wind Stakeholder Process

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# NANTUCKET SOUND OFFSHORE WIND STAKEHOLDER PROCESS

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**Abstract:** In response to government efforts to promote renewable energy development, Cape Wind Associates proposed the first offshore wind farm in the United States. The plan has been met with both vehement opposition and ardent support. In response to an increasingly unproductive debate over the project, the Massachusetts Technology Collaborative (MTC), a quasi-state agency, held a series of stakeholder meetings to establish a shared framework for analyzing the proposed wind farm. Through a facilitated process, stakeholders established rules and agendas for the six resulting meetings, which included presentations, discussions, and questions and answer sessions. The MTC compiled a wealth of materials generated by these meetings and made the results widely available both online and on compact disc. Most participants in the stakeholder sessions found substantial value in the opportunity for information exchange in a neutral setting. The MTC concluded that unbiased, reliable information is a powerful tool in fostering acceptance of new renewable energy technologies; however, in the case of offshore wind development, aesthetic concerns and the absence of an established regulatory framework for ocean-based renewable energy projects remain significant obstacles.

State and federal incentives designed to encourage the development of renewable energy resources succeeded in attracting the first proposal for an offshore wind farm in this country, off the coast of Massachusetts. Cape Wind Associates chose this site—in Nantucket Sound between Cape Cod, Martha's Vineyard, and Nantucket—for its unique combination of attributes necessary to support offshore turbines using current technology. The 420-megawatt wind farm would be the largest renewable energy project in New England, and one of the largest offshore wind farms proposed anywhere in the world.[1] At

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[1] Airtricity of Ireland is currently constructing the first 25-megawatt (MW) phase of an offshore wind farm on Arklow Banks, which will have an installed capacity of 520 MW if

its most landward point the array of 130, 426-foot turbines would be four miles offshore in federal waters.

As Cape Wind's proposal became public, interests quickly polarized. Residents, business owners, and some environmental interests opposed to the wind farm object to the "industrialization" of Nantucket Sound and potential impacts to navigation, marine life, migratory birds, tourism, and property values. Secondly, they argue that the federal government does not have the authority under existing law to allow this private, commercial use of public waters. Wind farm proponents and their supporters assert that renewable energy development is a critical public policy objective, that the ongoing environmental review is adequate to protect public interest, and that the project should be judged on its merits.

The Massachusetts Technology Collaborative (MTC)—a quasi-state agency that administers the commonwealth's Renewable Energy Trust Fund—responded to the growing controversy by convening a stakeholder forum to cut through the hyperbole that characterized the early debate regarding Cape Wind's proposal, and develop a shared baseline of reliable information. The overarching goal of this effort is to ensure that this precedent-setting renewable energy project will be permitted or denied based on a legitimate technical assessment of facts rather than emotion or political pressure.

## I. Policy Context for Wind Energy Development

Concerns about climate change and other environmental impacts resulting from the burning of fossil fuels to generate electricity have inspired a host of policies and programs aimed at promoting renewable energy development.[2] As signatories to the Kyoto Protocol, European Union nations are working towards a goal of generating twenty-two percent of all their electricity from renewables by 2010, most of that coming from wind.[3]

Although many argue that the U.S. government has not done nearly enough to promote renewable energy, the federal Production

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completed as planned. Airtricity, Arklow Bank Wind Park 1 (2003), http://www.airtricity.net/download/1/Arklow%20infosheet.pdf (last visited Feb. 11, 2004).

[2] European Wind Energy Ass'n & Greenpeace, Wind Force 12, at 3 (2003) (citing G8 Renewable Energy Task Force, Final Report (2001), *available at* http://www.renewabletaskforce.org/pdf/G8_report.pdf) [hereinafter Wind Force 12].

[3] *Id.* at 12.

Tax Credits (PTC)[4] for wind energy have been partly responsible for spurring thousands of megawatts of land-based wind-generated electricity in the U.S.[5] In fact, wind is the fastest growing source of electricity in the world today, with an annual average growth rate of just over twenty-five percent.[6]

### A. *Renewable Energy Policy in Massachusetts*

Massachusetts is one of at least fourteen states with initiatives to actively promote the development of new renewable energy facilities.[7] In 1997, the Legislature passed a bill that, among other things, restructured the commonwealth's electric utility industry, uncoupled generation and distribution services, and brought consumer choice to the market.[8] Two major components of the restructuring legislation are designed to shift energy consumption away from fossil fuels and towards a greater reliance on renewable energy sources: the Massachusetts Renewable Portfolio Standard (RPS)[9] and the Massachusetts Renewable Energy Trust Fund (RETF).[10]

The RPS took effect in 2003 with a regulatory requirement that one percent of all energy sold to consumers come from renewable energy sources.[11] That amount increases by one-half of one percent

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[4] In 1992 the Energy Policy Act was signed into law and included enactment of a Production Tax Credit (PTC) under § 45 of the Internal Revenue Code. Energy Policy Act of 1992, Pub. L. No. 102-486, § 1916, 106 Stat. 2776, 3024 (codified as amended at I.R.C. § 45 (2000)). This credit was available to corporate entities building new renewable energy production facilities such as solar, biomass, wood chip, geothermal, and wind electric power production plants. I.R.C. § 45; *see* John A. Herrick, *Federal Project Financing Incentives for Green Industries: Renewable Energy and Beyond*, 43 NAT. RESOURCES J. 77, 101–07 (2003). The tax credit at inception of the law was $0.015 per kilowatt hour (kWh) produced by the facility, increased each year by the official rate of inflation from the previous year, for the first ten years of operation of the equipment. The current PTC rate is approximately $0.019 per kWh. The credit is available to new renewable energy facilities placed into commercial service after enactment of the law, and prior to the latest deadline, December 31, 2003. In early 2002, this PTC qualification date was extended by Congress for two years, grandfathered back to January 1, 2002. I.R.C. § 45; *see also* 10 C.F.R. § 451 (2003) (defining the program's qualifications for participants); 18 C.F.R. § 292.304 (setting rates).

[5] *See* Herrick, *supra* note 4, at 101–07.

[6] WORLDWATCH INST., THE CHOICE: AN ENERGY STRATEGY FOR THE 21ST CENTURY (2001), *at* http://worldwatch.org/press/news/2001/05/17/htm (last visited Jan. 19, 2004).

[7] *See* MASS. GEN. LAWS ch. 25A, § 11F (2003); Renewable Energy Portfolio Standard, MASS. REGS. CODE tit. 225, §§ 14.00–.12 (2003).

[8] *See* MASS. GEN. LAWS ch. 164, §§ 1A–1F.

[9] MASS. REGS. CODE tit. 225, § 14.00.

[10] MASS. GEN. LAWS ch. 40J, § 4E.

[11] MASS. REGS. CODE tit. 225, § 14.07(1).

each year thereafter until 2009.[12] If the program is successful, by that time four percent of the commonwealth's electricity will be generated from renewable energy sources.[13] This public policy directive to diversify the energy supply with renewable energy production is supported by the RETF,[14] a ratepayer-funded program of financial incentives aimed at private-sector energy developers, with a goal of increasing the supply of and demand for renewable energy, as well as making renewable energy more competitive in the marketplace.

The money to fund the RETF comes from a systems benefit charge paid by ratepayers served by investor-owned utilities.[15] Since 1998, this charge—determined by the amount of electricity consumed—has raised nearly $200 million.[16] It will generate about $20 million per year after that.[17] The fund is managed by the MTC,[18] a quasi-state agency with a mandate to promote the commonwealth's innovation economy.

While the RETF provides incentives designed to encourage the development of all renewable energy sources,[19] wind energy has emerged as the resource with the greatest near-term potential to compete economically with fossil fuels.[20] Coastal New England has some of the richest wind resources in the world; in the densely-populated Northeast, siting wind farms offshore is one of the only possibilities for developing the utility-scale renewable energy facilities necessary to meet renewable energy production targets.[21]

### B. *The Private Sector Responds*

Despite the incentives-based policies designed to spur the growth of the renewable energy sector in the U.S., the worldwide increase in

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[12] *Id.*

[13] *See id.*

[14] MASS. GEN. LAWS ch. 40J, § 4E.

[15] The average residential ratepayer pays about fifty cents a month, or six dollars a year.

[16] MASS. GEN. LAWS ch. 164, § 20(a)(1).

[17] *Id.*

[18] For a description of the MTC's mission, see MASS. TECH. COLLABORATIVE, WHAT WE DO, *at* http://www.masstech.org/AgencyOverview/whatwedo.htm (last visited Jan. 19, 2004).

[19] *See* MASS. GEN. LAWS ch. 25A, § 11F; MASS. REGS. CODE tit. 225, §§ 14.00–.12 (2003).

[20] *See* WIND FORCE 12, *supra* note 2, at 5.

[21] *See* Steven Ferrey, *Generation Technologies and Fuels for Electric Plus Thermal Energy*, *in* 1 LAW OF INDEPENDENT POWER § 2:11 (2003) ("In New England for example, more than 100 percent of the current electric demand could be supplied by wind energy resources."). Cape Wind's website also offers support for this claim. *See* CAPE WIND ASSOCS., PROJECT OVERVIEW: PROJECT AT A GLANCE, *at* http://www.capewind.org/index.htm (last visited Feb. 6, 2004).

wind energy development, and the increasing focus on offshore development in European countries during the past fifteen years, Cape Wind's proposal to construct a 170-turbine[22] wind farm off the coast of Cape Cod caught federal and state regulatory agencies by surprise.[23] The developers had spent two years assessing the options for offshore wind production in areas that meet the nonnegotiable siting requirements of wind speed, shallow, protected waters, and access to transmission lines, and identified Horseshoe Shoal in Nantucket Sound as the best option, not only in New England, but perhaps anywhere on the East Coast.[24] Cape Wind's proposed location is four miles from the closest point of land on Cape Cod, in the town of Yarmouth—outside the state's statutory three nautical-mile jurisdiction—in federal waters.[25]

The U.S. has no specific regulatory process in place for reviewing offshore wind projects.[26] The Department of Interior's Minerals Management Service (MMS) oversees leases for offshore oil and gas facilities on the Outer Continental Shelf, pursuant to the Outer Continental Shelf Lands Act (OCSLA);[27] however, its jurisdiction does not extend more generally to other commercial uses.[28] While government planning substantially drives offshore wind projects in other countries, Cape Wind's proposal emerged in advance of any proactive analysis, and actually helped ignite the national debate about offshore renewable energy.[29]

After much discussion among the potential federal regulatory agencies, it was determined that the Army Corps of Engineers (Corps) was the appropriate permitting entity to consider Cape Wind's pro-

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[22] The size of the wind farm has been reduced from 170 to 130. David Arnold, *Size of Wind Farm Plan Reduced*, BOSTON GLOBE, Jan. 22, 2003, at B3.

[23] RAAB ASSOCS. ET AL., FACILITATOR'S REPORT: THE CAPE & ISLANDS OFFSHORE WIND STAKEHOLDER PROCESS, AN MTC PUBLIC OUTREACH INITIATIVE 3–4 (2003), *available at* http://wind.raabassociates.org/articles/facilitators_report.doc (last visited Feb. 6, 2004) [hereinafter FACILITATOR'S REPORT].

[24] John Learning, *Sound Only N.E. Choice, Expert Says*, CAPE COD TIMES, Dec. 13, 2002, at A3.

[25] U.S. ARMY CORPS OF ENG'RS, ENVIRONMENTAL IMPACT STATEMENT SCOPE OF WORK, WIND POWER FACILITY PROPOSED BY CAPE WIND ASSOCIATES, LLC (2002), *available at* http://www.cleanenergystates.org/JointProjects/offshore%20docs/Cape_Wind_EIS_Scope.pdf (last visited Feb. 12, 2004) [hereinafter SCOPE OF WORK EIS]. For a map of the proposed wind farm, see CAPE WIND ASSOCS., PROJECT OVERVIEW: PROJECT SITING AND VISUAL SIMULATIONS, *at* http://www.capewind.org (last visited Feb. 6, 2004).

[26] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 78 (D. Mass. 2003).

[27] Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331–1356 (2000).

[28] *Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 74.

[29] Stephanie Ebbert, *On Wind, Some Blow Hot and Cold*, BOSTON GLOBE, June 17, 2003, at A1.

posal, by virtue of the authority of the Rivers and Harbors Act.[30] The Corps would also serve as the lead agency under the National Environmental Policy Act (NEPA), bringing directly into the review at least seventeen other agencies representing a wide range of statutory authorities and public interests.[31]

While the direct state and local permitting role in the Cape Wind proposal is limited to the aspects of the project that cross state waters or occur at the shore, such as undersea cables and grid interconnections, Massachusetts's federally-approved Coastal Zone Management Program (CZMP) provides the commonwealth's Coastal Zone Management Office with substantial standing in the federal permitting process.[32] Regulators at the Corps, the Massachusetts Environmental Policy Act (MEPA) Office, and the Cape Cod Commission agreed to coordinate their review processes, basing their analysis on a single, comprehensive Environmental Impact Statement as required by the Corps.[33]

## II. Local Reaction to the Cape Wind Proposal

The Cape Wind proposal spurred intense debate among the citizens on Cape Cod, Martha's Vineyard, and Nantucket.[34] Modern wind turbines are unfamiliar and physically massive structures.[35] The plan to construct 130 turbines in a heavily-used offshore location, combined with an unprecedented permitting process, generated substantial uncertainty and concern among residents and the regulatory community.[36]

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[30] Rivers and Harbors Appropriation Act of 1899 § 10, 33 U.S.C. § 403 (2000). This jurisdiction is based on Regulatory Guidance Letter 88-08, issued in 1988 for the purpose of exerting Corps's authority over what was at the time a new class of projects being proposed on the Outer Continental Shelf (OCS): artificial islands, structures supporting gambling casinos, and other similar installations. U.S. Army Corps of Eng'rs, Regulatory Guidance Letter 88-08, Regulation of Artificial Islands, Installations and Structures on the U.S. Outer Continental Shelf (1998), *available at* http://www.spk.usace.army. mil/cespk-co/regulatory/RGLs/88-08.html (last visited Jan. 19, 2004). This guidance letter interprets the legislative history of the Outer Continental Shelf Lands Act (OCSLA) as reflecting Congress's intention that the Corps regulates, through the Rivers and Harbors Act, all such structures, regardless of the purpose they serve. *Id.*

[31] *See* Brief of Amicus Curiae Conservation Law Foundation, at 6–10, *Alliance to Protect Nantucket Sound* (No. 02-11749-JLT).

[32] *See* Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(A) (2000).

[33] Scope of Work EIS, *supra* note 25.

[34] *See* Ebbert, *supra* note 29, at A1.

[35] *See* Facilitator's Report, *supra* note 23, at 3.

[36] *See* Ebbert, *supra* note 29, at A1.

An organized and well-financed opposition group, the Alliance to Protect Nantucket Sound (Alliance) quickly coalesced, mounting an aggressive campaign against the project based on concerns including: potential threats to commercial and recreational fishing; migratory birds; local tourist industry; marine ecology; and the coastal viewshed.[37] The Alliance filed lawsuits challenging the Corps's authority to permit activities on the Outer Continental Shelf.[38] The Cape Cod Chamber of Commerce, working through the Alliance, galvanized local business opposition to the project.[39] The Humane Society and the Barnstable Land Trust are among the more notable local conservation organizations supporting the Alliance's campaign.[40]

The Cape Wind project has a strong cadre of supporters as well.[41] A number of local, state, and national environmental organizations, including the Union of Concerned Scientists, the Conservation Law Foundation, and the Cape & Islands Self Reliance aligned themselves with the project proponents.[42] Despite the unknowns, these groups view the wind farm as a tremendous opportunity to advance the region's renewable energy agenda.[43] They highlight benefits including: improved air quality; a significant contribution towards mitigating climate change; the diversification of the commonwealth's energy portfolio; and increased energy independence based on the development of indigenous energy resources. These organizations look to the regulatory review process to answer environmental and economic concerns, and offered their qualified support pending the outcome of the regional, state, and federal regulatory process.[44] Organized la-

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[37] *See id.*; *see also* ALLIANCE TO PROTECT NANTUCKET SOUND, INC., ABOUT/CONTACT Us, *at* http://www.saveoursound.org/contactus.html (last visited Feb. 6, 2004).

[38] *See* Alliance to Protect Nantucket Sound v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 64 (D. Mass. 2003).

[39] *See* Stephanie Ebbert, *Kennedy Retreats on Wind Farm Amendment*, BOSTON GLOBE, July 31, 2003, at B1.

[40] The Alliance lists its supporters on its website. *See* ALLIANCE TO PROTECT NANTUCKET SOUND, INC., WHO'S CONCERNED, *at* http://www.saveoursound.org/allies.html (last visited Feb. 6, 2004).

[41] Cape Wind lists its supporters on its website. *See* CAPE WIND ASSOCS., OUR SUPPORTERS: PROJECT SUPPORTERS, *at* http://www.capewind.org/index.php (last visited Jan. 25, 2003).

[42] *Id.*

[43] CAPE WIND ASSOCS., PROJECT AT A GLANCE, *at* http://www.capewind.org/index.php (last visited Jan. 25, 2004).

[44] *See* Brief of Amicus Curiae Conservation Law Foundation at 1, Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64 (D. Mass. 2003) (No. 02-11749-JLT).

bor supports the wind farm as well, citing the creation of hundreds of construction, manufacturing, and maintenance jobs.[45]

### A. *Deteriorating Debate*

The public debate quickly devolved into a two-sided battle to influence the permitting process via public opinion.[46] Opponents and proponents bolstered their arguments with handpicked expert testimony, using their websites to disseminate one-sided information.[47] Statements at public hearings went unchallenged and unsubstantiated in the structured regulatory proceedings designed to elicit passive testimony rather than foster dialogue.[48] Concerned citizens felt compelled to take a firm stand for or against the project early on, most unaware of the rigorous and lengthy regulatory process that would precede any permit decision.

As a result, very little useful information was generated.[49] Policy issues with important, precedent-setting consequences for the country as a whole were being "debated" in an emotionally and politically charged atmosphere that made it difficult to sort through the rhetoric.[50]

Throughout these proceedings, the Cape Wind proposal was the focus of intense local, national, and international media coverage.[51] Most importantly, the *Cape Cod Times*, the region's only daily newspaper, editorially opposed the project, and the federal regulatory permitting process from the beginning, and challenged elected officials representing Cape Cod, Martha's Vineyard, and Nantucket to join the

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[45] *See* Cynthia Roy, *Unions, Fishermen Back Wind Farm for Nantucket Sound*, BOSTON GLOBE, Apr. 25, 2003, at B3.

[46] *See* Ebbert, *supra* note 29, at A1.

[47] *See* ALLIANCE TO PROTECT NANTUCKET SOUND, INC., FREQUENTLY ASKED QUESTIONS, *at* http://www.saveoursound.org/faq.html (last visited Feb. 6, 2004); CAPE WIND ASSOCS., FREQUENTLY ASKED QUESTIONS ABOUT THE CAPE WIND PROJECT, *at* http://www.capewind.org/index.php (last visited Feb. 6, 2004).

[48] *See* U.S. ARMY CORPS OF ENG'RS, PUBLIC SCOPING SESSION: WIND FARM PROPOSAL ENVIRONMENTAL IMPACT STATEMENT 6–15 (2002), *available at* http://www.nae.usace.army.mil/projects/ma/ccwf/0306WIND.pdf (last visited Jan. 23, 2004).

[49] Glenn Ritt, *The Windmill War: Point-Counterpoint*, CAPE CODDER, Sept. 6, 2002, at 48.

[50] Ebbert, *supra* note 29, at A1 ("[B]oth the opponents and proponents are trying to capture public opinion by flooding TV and radio airwaves .... The Alliance estimates it has already spent $100,000 on ads. Cape Wind places its media buys at about $200,000 .... Both sides have paid more money to hard-driving public relations firms and lobbyists.").

[51] *See* James Bone, *Wind Farm Threatens Kennedys' Playground*, TIMES (London), July 5, 2003, at 15; Ebbert, *supra* note 29, at A1; Scott Kirsner, *Wind Power's New Current*, N.Y. TIMES, Aug. 28, 2003, at G1.

opposition.[52] The decision to forsake neutrality on the part of such an important source of local information fueled the controversy.[53]

Conversely, Cape Cod's network of weekly community-based newspapers, the *Cape Codder*, took a neutral editorial position on the project and used the MTC's stakeholder process as a springboard for launching an objective public education campaign.[54] Beyond that, the paper sent reporters to Europe to learn first hand what has been learned from other countries' experiences with their offshore wind farms and to share those insights with their readers.[55]

### B. *The MTC Carves Out a Role*

The MTC did not immediately offer unqualified support for this major renewable energy project. In terms of the agency's long term objective of building the state's renewable energy sector, however, the worst possible outcome would be for the first offshore wind farm constructed in the U.S. to be inappropriately sited, with inadequate analysis, creating unacceptable impacts or failing to deliver on its projected generation.[56] At this early stage, there were too many unknowns and legitimate questions to be addressed. Consequently, the MTC turned its attention to the regulatory process to determine how best to support the integrity of technical review and the legitimate engagement of the general public and stakeholders.

Staff from the MTC attended most of the initial public gatherings held to discuss the pros and cons of the wind farm, including hearings convened under the auspices of the Corps, the MEPA Office, the Cape Cod Commission, the Martha's Vineyard Commission, and the Nantucket Planning and Economic Development Commission, along with a series of informational meetings hosted by individual towns, schools, and civic organizations on Cape Cod and Martha's Vineyard.[57]

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[52] *See, e.g.*, Editorial, *Ill Winds Over Photos*, CAPE COD TIMES, Oct. 25, 2003.

[53] Mark Jurkowitz, *Ill Wind Over Cape Cod Times*, BOSTON GLOBE, Sept. 3, 2003, at D1.

[54] RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Appendices: Renewable Energy Options for the Cape & Islands*, *in* CAPE & ISLANDS OFFSHORE WIND STAKEHOLDER PROCESS FINAL REPORT (CD-ROM, 2003) (on file with author), *available at* http://www.masstech.org/offshore/index.htm [hereinafter FINAL REPORT].

[55] Doreen Leggett, *What the Danes Can Teach Us About Wind Power*, CAPE CODDER, Mar. 7, 2003.

[56] *See, e.g.*, CAPE WIND ASSOCS., PROJECT OVERVIEW: PROJECT AT A GLANCE, *at* http://www.capewind.org/index.php ("The project will be capable of replacing up to 113 million gallons of oil per year.").

[57] Memoranda from Greg Watson, Vice President, MTC, to MTC staff (Dec. 2001–May 2002) (on file with author).

Although there were strong statements of opposition and support in all of these venues, it appeared that the majority of individuals were still forming opinions of the project and many were frustrated by the lack of objective information available.[58] Based in part on an assessment within the agency, and in part on requests by key stakeholders, the MTC's leadership determined to fill this void by creating a new forum for unbiased discussion of the Cape Wind proposal and to identify, produce, and disseminate data to assist informed decision-making.[59] The focus was to be on assisting all interested parties to understand the context within which the project was being proposed and to build the capacity necessary to critique the EIS upon publication.[60] The Cape and Islands Offshore Wind Outreach Team was established, bringing together staff and consultants with expertise in the energy system, coastal policy, public participation, and the Cape Cod community, to structure the initiative.[61]

Initially, the proposal by the MTC—an agency charged with promoting large-scale renewable energy production[62]—to play the role of honest broker was met with skepticism. The logic, however, was compelling: the future of renewable energy development in Massachusetts necessitated a rigorous, transparent review of the first utility-scale project proposed in the state. What was missing was a neutral forum where conservation groups, renewable energy advocates, users of Nantucket Sound, local interest groups, regulators, and experts in the electric utility industry could exchange perspectives, vet information, and refine outstanding issues for further study. Without this opportunity, the analysis would most likely be compromised by political pressure, emotion, and confusion on the part of the public.

### C. *Identifying the Players*

If an effort to engage stakeholders in productive dialogue was going to succeed, certain key organizations and agencies had to be at the table and willing to participate fully. Cape Wind, the Alliance, and the Corps were absolutely essential. Interestingly, while all three would

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[58] John Leaning, *Sifting Through Wind Farm Hyperbole*, CAPE COD TIMES, Sept. 29, 2002, at 1.

[59] Doreen Leggett, *Winds of Change: The Massachusetts Technology Collaborative Hopes to Make Sense of a Battle Over Cape Cod Wind Farm*, CAPE CODDER, Sept. 13, 2002, at 1.

[60] *See* discussion *infra* Part II.E.

[61] *See* discussion *infra* Part II.E.

[62] *See* MASS. TECH. COLLABORATIVE, *at* http://www.masstech.org (last visited Feb. 6, 2004).

eventually agree to participate,[63] each had strong reservations about the process in the beginning.

The Alliance shared the belief with the *Cape Cod Times* that no matter what was stated publicly, the MTC had to harbor a bias towards wanting the wind farm to be built, and that bias would influence the stakeholder process.[64]

Cape Wind was concerned that the process was duplicative of the NEPA process[65] and feared that it would provide opponents with opportunities to expand the scope of work for the EIS and time frame of the permitting process.[66] They were also concerned that the opposition would be allowed unprecedented access to the regulators.[67]

The Corps was concerned that the meetings would get out of control, leading to a chaos that would compromise its process and result in criticism from all sides.[68]

Finally, others believed that some perspectives or voices would be excluded through the stakeholder selection process. To address this fear, the MTC staff conducted dozens of interviews to ensure that the broadest spectrum of interests would be represented at the stakeholder table.[69] Each interview included the question: "Who else should we be speaking to?"[70] Ultimately, twenty-three groups or individuals representing particular interests were invited to participate as *stakeholders*.[71] They were joined by twenty-one individuals representing agencies with a formal role in the regulatory process, along with elected officials, all serving as *resources*, as described below.[72]

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[63] For a complete list of the participants, see FACILITATOR'S REPORT, *supra* note 23, at 26.

[64] John Leaning, *Agency's Goal: Informed Debate of Wind Farm*, CAPE COD TIMES, July 11, 2002, at A6 ("Isaac, a spokesman for the anti-wind farm group Alliance to Protect Nantucket Sound, said while there is room to question the neutrality of Watson's group 'We appreciate anyone who wants to come in and discuss these issues further.'").

[65] 42 U.S.C. § 4332 (2000); *see* SCOPE OF WORK EIS, *supra* note 25.

[66] *See, e.g.*, 42 U.S.C. § 4332(c) (requiring that reports include "alternatives to the proposed action").

[67] Interviews by Greg Watson, Vice President, MTC, with Jim Gordon, President, Cape Wind Associates (n.d.).

[68] Interview by Greg Watson, Vice President, MTC, with Christine Godfrey, Chief, Regulatory Division, U.S. Army Corps of Engineers (n.d.).

[69] *See* FACILITATOR'S REPORT, *supra* note 23, at 4, 8.

[70] *See id.* at 31–32.

[71] *Id.* at 11, 26.

[72] *Id.* at 27–28.

### D. *Unique Challenges to Wind Energy Development in Massachusetts*

The following goals established for the stakeholder process were relatively modest, but fundamental to supporting a rational analysis of the project: (1) to achieve a better shared understanding of the Cape Wind project's potential benefits and environmental impacts; (2) to shed light on the regulatory process and policy drivers behind the project; (3) to develop a mutual understanding among the conflicting positions of project proponents and opponents; (4) to provide data and information to reveal any areas of factual or philosophical agreement among the stakeholders; and (5) to help prepare all parties to review the material to be presented in the EIS and participate effectively in the regulatory process.[73]

While it is common practice to provide structured advisory or public participation forums in the course of permitting controversial projects, the Cape Wind project created a unique set of challenges to engaging stakeholders effectively.

First, although the MTC convened and provided the financial support for the stakeholder forums, and was committed to the neutrality of the process, it also participated as one of the key stakeholders.[74] Professional facilitators were hired to help design and manage the meeting framework.[75] The MTC Offshore Wind Outreach Team worked with the facilitators to handle logistics and organize the meetings. The MTC leadership held a seat at the table and actively participated, but did not control the discussion in any way.[76]

Second, the stakeholder process was intimately connected to the Corps's regulatory proceedings, but not a sanctioned component of it. The MTC stakeholder group was voluntary, not sanctioned by any authority or regulatory proceedings, and had no decisionmaking ability.[77] There would be no attempt to reach consensus on the ultimate fate of the project.[78]

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[73] *See id.* at 5 ("The goals were specifically articulated as educational and information sharing.").

[74] *Id.* at 24–26.

[75] Raab Associates, with Greg Sobel and Suzanne Orenstein.

[76] For summaries of all meetings, see FINAL REPORT, *supra* note 54.

[77] FACILITATOR'S REPORT, *supra* note 23, at 5 ("[The stakeholder process] was not designed to be a formal consensus-seeking or settlement process to determine whether stakeholders could reach agreement on whether or not the project should go forward, and under what conditions.").

[78] *Id.*

Third, the time frame for the stakeholder process was determined by the Corps's projected schedule for release of the EIS. The Corps's ambitious review schedule suggested that the EIS could be released as early as February 2003.[79] This created a small window of opportunity to convene the stakeholders, starting in October 2002. Though no one suspected the Corps's projected schedule was realistic, the stakeholder process design had to be based on best available information. While this was an added pressure, the sense of urgency and focus motivated and contributed to an intensity that was ultimately beneficial.

Fourth, the stakeholder process would occur during legal challenges to the regulatory process.[80] Although many interests questioned the appropriateness of the Corps as the lead regulatory authority, most notably the Alliance who has challenged the permitting proceedings in court, the process continued.[81] The MTC frequently reminded the group that until and unless the Corps terminated its review, it made sense to prepare to participate fully and effectively and to use the expertise provided by the stakeholder process to its advantage.

Fifth, the tenor of the debate and the information generated during the stakeholder process had implications far beyond this particular project. As stated earlier, the Cape Wind proposal is unprecedented in several respects: (1) it is the first offshore wind farm proposed in this country, and one of the largest in the world;[82] (2) it has challenged the regulatory structure to consider the appropriateness of authorizing non-oil and gas energy projects in public waters on the Outer Continental Shelf;[83] and (3) it is proposed in a multi-use ocean site adjacent to the densely populated New England Coast, challenging the community's commitment to large-scale renewable energy development.[84] Interests from across the country are monitoring the proceedings carefully.

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[79] U.S. ARMY CORPS OF ENG'RS, CAPE WIND FARM PROJECT FACT SHEET (2002), http://www.masstech.org/offshore/Appendices/ACOEFactSheets/farmfact.pdf (last visited Feb. 6, 2004).

[80] *See* Alliance to Protect Nantucket Sound, Inc. v. U.S. Dep't of the Army, 288 F. Supp. 2d 64, 66–67 (D. Mass. 2003).

[81] *Id.*

[82] FACILITATOR'S REPORT, *supra* note 23, at 3.

[83] *See Alliance to Protect Nantucket Sound*, 288 F. Supp. 2d at 73–74.

[84] *See supra* text accompanying notes 7–14.

### E. *The Stakeholder Process Design*

The structure of the stakeholder process, jointly crafted by the MTC Offshore Wind Team and the facilitators, responded to circumstances outlined above.

#### 1. Community Stakeholders and Agency Resources

In order to incorporate the regulatory agencies and elected officials, the meetings included a two-tiered structure.[85] The stakeholders were considered the primary participants, and agency representatives served as resources to support their discussion with questions and information.[86] The regulatory community, not wanting to compromise their future decisionmaking responsibilities with regard to Cape Wind, supported this process by playing a secondary role.[87] This was particularly true as the agenda evolved and no one could predict how the sessions would proceed.[88] In the end, as the stakeholder group became more comfortable and trusted the integrity of the dialogue, the lines between stakeholders and resources softened to some extent.[89]

#### 2. Stakeholders Set the Agenda

Six all-day sessions were ultimately held between October 2002 and March 2003.[90] The overall framework included plenary sessions at each meeting during which panels of experts presented information on a particular topic.[91] The first meeting was designed to bring the

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[85] *See* RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Stakeholder Group: Draft Purpose, Charge, and Groundrules*, *in* FINAL REPORT, *supra* note 54, ¶ 4, *available at* http://www.masstech.org/offshore/Meeting1/groundrulesfinal1010.htm (last visited Feb. 6, 2004) [hereinafter *Groundrules*].

[86] *See id.* ("Stakeholder Group members can participate in all discussions and deliberations.").

[87] *See id.* ¶ 12 (listing regulatory agencies as "Resources/Advisors" rather than "Stakeholder Groups"). For each of the meetings, the facilitators sat at the head of the room. The stakeholders sat at tables facing the facilitators and the resources and advisors sat at tables behind the stakeholders. The media and other observers were behind the resources and advisors in the back of the room.

[88] *See* FINAL REPORT, *supra* note 54, at index page.

[89] *See, e.g.*, RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Meeting #6 Summary*, *in* FINAL REPORT, *supra* note 54, at III (cataloging an extensive dialogue between the stakeholders), *available at* http://www.masstech.org/offshore/capemtgsumm312final.htm (last visited Jan. 19, 2004) [hereinafter *Meeting #6 Summary*].

[90] As of this writing, the EIS has not been published. The softening of the deadline permitted the stakeholder process to run beyond February at the request of the group.

[91] *See Meeting #6 Summary*, *supra* note 89.

group to a common understanding of the proposed project, the analysis conducted to date, and the structure of the regulatory process, and to allow the group to identify highest-priority information needs to set the agenda for the upcoming sessions.[92] Once topics were identified, stakeholders were called upon to suggest speakers; every effort was made to have each panel reflect opposing viewpoints where they existed.[93] Topics covered in each meeting are summarized below.

Meeting 1: October 10, 2002 (68 Attendees)

- Outlining Potential Benefits and Potential Adverse Impacts from Offshore Wind Development for the Cape & Islands and New England (three facilitated break-out groups)
- The Cape Wind Project: What do we know? What do we need to better understand?
- Overview of Current Studies and Processes and the EIS Process Group Discussion to Identify Highest Priority Information Needs

Meeting 2: October 31, 2002 (71 Attendees)

- Electricity Supply, Reliability, Pricing and Air Impacts
- Avian Information Baseline, Methodologies, and Concerns
- Marine Species and Habitat Information Baseline

Meeting 3: November 21, 2002 (82 Attendees)

- Marine Species and Habitat Information Baseline (continued)
- Avian Impact Issues for Offshore Wind (continued)
- Offshore Wind Farm Technologies and Economies

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[92] RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *First Meeting Agenda*, *in* FINAL REPORT, *supra* note 54, *available at* http://www.masstech.org/offshore/Meeting1/Agenda101002rev6.htm (last visited Jan. 25, 2004).

[93] *See* RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Meeting #1 Summary*, *in* FINAL REPORT, *supra* note 54 ("One attendee requested that all experts brought in have no stated position on the Cape Wind project, but others suggested that as long as balanced perspectives were presented a stated position one way or the other should not invalidate the contributions of a presenter."), *available at* http://www.masstech.org/offshore/Meeting1/MeetingSummaryrev4.htm (last visited Feb. 6, 2004) [hereinafter *Meeting #1 Summary*].

Meeting 4: December 12, 2002 (73 Attendees)

- Visual Impacts
- Alternative Sites

Meeting 5: January 30, 2003 (84 Attendees)

- Federal Decisionmaking Processes for Private Development Offshore
- Potential Climate Change Impacts on Cape & Islands
- Economic Impacts

Meeting 6: March 12, 2003 (91 Attendees)

- Army Corps's of Engineers Preliminary Screening of Alternative Sites

3. Ground Rules, Meeting Summaries, and Stakeholder Process Website

The stakeholders agreed to follow a draft set of ground rules developed by the facilitators prior to the first meeting.[94] The facilitators prepared a detailed meeting summary following each meeting, circulated it in draft form, and vetted it with the group.[95] The stakeholder process website developed by Raab Associates was an essential vehicle for communication, where meeting summaries were posted together with speakers' presentations, supporting materials, and any other documents referenced during the meeting.[96] Meeting notes were taken electronically, allowing for a quick turnaround necessary with the tight timeframe.[97] The contents of the website were made available to the public. Even though public participation was limited in the session itself, detailed information on the group's progress was available to anyone interested.[98]

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[94] *See id.* at I.

[95] *See generally* FINAL REPORT, *supra* note 54, at index page (listing all meeting agendas and summaries).

[96] *Id.* The Final Report on CD-ROM is essentially the final version of the website. *See id.*

[97] *See id.*

[98] *See id.*

### 4. Structured Discussion

Due to the incredibly ambitious overall agenda set forth by the stakeholders, there was a constant tension between the need to provide sufficient in-depth treatment of the many high-interest topics, and the desire to allow time for free-flowing discussion among stakeholders and resources. Each panel presentation was followed by clarifying questions and discussion among the stakeholders as time allowed.[99] Those serving as resources had more limited opportunity to contribute directly.[100] Meetings were open to the public, but space was limited, as was the opportunity for questions from the public. As reflected in the ground rules, participants accepted the responsibility for communicating the results of the stakeholder meetings to their respective constituencies.[101]

### 5. Filling in the Gaps

The MTC provided funding where possible and appropriate to address technical information gaps, in direct response to requests from stakeholders, or as part of its overall mission.[102]

For example, a wind-mapping project was initiated in late 2000 as part of the MTC's Green Power Program.[103] The objective was to map the wind resource characteristics of Southern New England, including its offshore areas.[104] These maps provided valuable, scientifically based

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[99] *See* FINAL REPORT, *supra* note 54, at index page. Presenters included representatives from the Army Corps of Engineers, the Audubon Society, private-sector consultants, academics in energy fields, endangered species advocates, state and national regulators, and utilities. *Id.*

[100] *See id.*

[101] *See Groundrules*, *supra* note 85, ¶¶ 8, 19.

[102] *See* RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Meeting #2 Summary*, *in* FINAL REPORT, *supra* note 54, at IV, *available at* http://www.masstech.org/offshore/Meeting2/Summary103102rev2.htm (last visited Jan. 25, 2004) [hereinafter *Meeting #2 Summary*].

[103] *See* RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Wind Resource Maps*, *in* FINAL REPORT, *supra* note 54, *available at* http://www.masstech.org/offshore/WINDRESOURCEMAPSrev.htm (last visited Jan. 25, 2004).

[104] *Id.* The MTC partnered with Connecticut Clean Energy Fund and Northeast Utilities Systems and contracted with AWS Scientific to create this database of information. *Id.* The Southern New England wind resources map, completed in early 2002, analyzed surface and upper-air geophysical databases using a powerful mesoscale atmospheric modeling system called MesoMap to produce detailed maps of the wind resource at different heights across the region. *Id.*

information that proved helpful in responding to questions regarding potential alternative wind farm sites.[105]

The MTC also provided funding to the Massachusetts Audubon Society for the purpose of conducting surveys of Roseate Tern activity within Nantucket Sound during different parts of the year to determine if the proposed wind farm might threaten this endangered bird species.[106]

## III. Conclusions and Looking Ahead

The full impact and value of the MTC's Offshore Wind Stakeholder Process cannot be assessed until after decisionmaking on the Cape Wind proposal is complete. The following two questions can be addressed at this stage: how did the stakeholders value the experience, and how did the stakeholder process advance the MTC's understanding of how to effectively promote offshore wind development in Massachusetts?

### A. *Participant Evaluation*

The follow-up participant survey conducted by Raab Associates revealed a relatively high overall sense of benefit to the stakeholders, with stakeholders ranking the overall value of the process at an average of 7.9 out of a possible 10 points.[107]

Responses to the survey's open-ended questions confirmed the overall value of having a neutral, civil forum in which to engage in the contentious issues surrounding the Cape Wind proposal.[108] The quality and depth of the information presented was praised.[109] Several

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[105] *Id.*

[106] Div. of Conservation Sci. & Ecological Mgmt., Mass. Audubon Soc'y, Survey of Tern Activity Within Nantucket Sound, Massachusetts, During Pre-Migratory Fall Staging (2003), *available at* http://www.masstech.org/offshore/audubonfinal.pdf (last visited Feb. 6, 2004).

[107] Facilitator's Report, *supra* note 23, at 15–16. On a scale of 1 to 10, the stakeholders ranked Information About Offshore Wind Generally at an average of 7.8, with a low score of 5 and a high score of 10; Information About the Cape Wind Project Specifically at an average of 7.3, with a low score of 3 and a high score of 10; Understanding the Regulatory Process for Permitting at an average of 7.5, with a low score of 4 and a high score of 10; Perspectives of the Stakeholders at an average of 7.8, with a low score of 5 and a high score of 10; Value of the Presentations at an average of 7.9, with a low score of 5 and a high score of 10; Facilitation at an average of 8.3, with a low score of 4 and a high score of 10; and an Overall Value of the Process at an average of 7.9, with a low score of 3 and a high score of 10. *Id.*

[108] *Id.* at 16–17.

[109] *Id.* at 16.

participants commented that the format was too constrictive to allow free-flowing exchange; at the same time others noted that several issues would have benefited from more thorough treatment.[110] This tension was difficult to alleviate given the wide range of important issues needing clarification within the prescribed timeframe.[111] The MTC may reconvene the stakeholders for a more interactive session upon publication of the EIS, to allow the group to review the document with the benefit of each other's expertise and perspective.[112]

Despite the initial uncertainty about its role in the process, the Corps benefited tremendously from its participation in the sessions.[113] The stakeholder group helped to refine and expand on the issues that needed to be addressed in the EIS, and provided an opportunity for exchange with experts in areas like the electricity distribution system, which are not typically part of the Corps's regulatory process. Perhaps most importantly, the stakeholder process enabled a level of productive public participation in this challenging review, which the Corps acting alone would not have had the resources to support.[114]

### B. *What the MTC Learned*

The MTC Offshore Wind Outreach Team initiated the stakeholder process understanding that the Cape Wind proposal presented an opportunity to activate the discussion of large-scale renewable energy development in Massachusetts in a profound manner. In the course of the dialogue among stakeholders, three issues emerged as key challenges to harnessing Massachusetts's offshore wind resources.

#### 1. Evaluating Aesthetics

Despite significant and widespread conceptual support for renewable energy, large-scale facilities will be difficult to site.[115] The EIS will address numerous important technical questions regarding the Cape Wind proposal; however, ultimately the issue of visual impacts will be

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[110] *Id.*

[111] *Id.* at 13.

[112] *Id.* at 14, 17.

[113] FACILITATOR'S REPORT, *supra* note 23, at 14, 18.

[114] *See id.*

[115] *See, e.g.*, RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Meeting #3 Summary*, *in* FINAL REPORT, *supra* note 54, at IV (discussing technological and environmental constraints on siting), *available at* http://www.masstech.org/offshore/Summary112103rev3.htm (last visited Jan. 25, 2004) [hereinafter *Meeting #3 Summary*].

one of the greatest obstacles to overcome.[116] In years past, fossil fuel-powered energy facilities and their attendant environmental and public health impacts were often relegated to disempowered urban neighborhoods.[117] Wind energy facilities have to be sited where it is technically feasible to harness winds of sufficient speed.[118] This includes high-value coastal areas where communities have the capacity to challenge development based on aesthetics, even if other environmental or economic concerns are unfounded.[119] Interestingly, European Union countries began in recent years to shift focus significantly from land-based wind farms to offshore installations in large part to reduce visual-impact concerns.[120]

### 2. Providing Reliable Information

The public, environmental organizations, and the regulatory community need reliable information resources and data on a wide range of previously unfamiliar topics in order to assess the appropriateness of particular renewable energy proposals.[121]

Before deregulation, the generation and distribution of electricity were background issues to most people not directly involved in the industry.[122] In evaluating the Cape Wind proposal, however, it has become clear that questions regarding the economics of wind power—who benefits and who pays—the functioning of the grid, wind power technology, and its interactions with the marine environment, are central to sound decisionmaking.[123] The stakeholder process demonstrated the power of good information from reliable sources, and the value of

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[116] *See* RENEWABLE ENERGY TRUST, MASS. TECH. COLLABORATIVE, *Meeting #4 Summary*, *in* FINAL REPORT, *supra* note 54, at III, *available at* http://www.masstech.org/offshore/Summary121202rev3.htm (last visited Jan. 25, 2004) [hereinafter *Meeting #4 Summary*].

[117] *See* ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 52 (2nd ed. 1998).

[118] *See Meeting #3 Summary*, *supra* note 115, at IV.

[119] *See Meeting #4 Summary*, *supra* note 116, at III.

[120] A.R. HENDERSON ET AL., OFFSHORE WIND ENERGY NETWORK, OFFSHORE WIND ENERGY IN EUROPE 1 (2001), http://www.owen.eru.rl.ac.uk/documents/BWEA23/BWEA23-_Henderson_Concerted_Actioni_paper.pdf (last visited Feb. 6, 2004).

[121] This was the premise behind the MTC's Stakeholder Process, which was designed with goals including better stakeholder understanding of the project and its impacts. *See* FACILITATOR'S REPORT, *supra* note 23, at 5–6.

[122] *See generally* SCOTT RIDLEY, PROFILE IN POWER: A HISTORY OF THE PEOPLE AND EVENTS THAT HAVE SHAPED AND CONTINUE TO SHAPE AMERICA'S CRITICAL INDUSTRY (American Public Power Association 1996).

[123] *See Meeting #2 Summary*, *supra* note 102, at III; *Meeting #3 Summary*, *supra* note 115, at IV.

drawing on the experience of other countries, in helping to inform community opinion. The compact disc compilation of presentations and background materials from the stakeholder process has been sought after by groups across the country as an important introduction to some of the fundamental topics relevant to offshore wind development.[124]

### 3. Establishing Public Policy for Developing Offshore Renewable Energy

Addressing the policy questions surrounding renewable energy projects proposed in public waters is an essential step in improving the context for the offshore wind development in Massachusetts. The following facts emerged from the stakeholder discussion as some of the most persuasive points raised by opponents of the Cape Wind project: (1) no regulatory regime or specific process for conferring private development rights targets offshore energy projects other than oil and gas;[125] (2) no siting standards exist for offshore wind farms and no planning has been undertaken;[126] and (3) no mechanism exists to require payment to the public for private use of public offshore lands of the Outer Continental Shelf.[127]

While technical concerns and potential impacts of a single wind farm proposal can be analyzed thoroughly through the NEPA process, even some supporters of the Cape Wind project are troubled by the implications of moving forward absent the kind of publicly vetted structure and compensation environmental advocates have always rightfully demanded for other kinds of energy development projects on public lands.[128] The situation will become more complex as the review begins for other pending offshore projects, including some that are speculative in nature and raise additional concerns.

Until a system is established, offshore wind farm developers face tremendous procedural and economic uncertainty. At least two quite different regulatory structures have been proposed by federal legislation, and little if any discussion has occurred regarding lease fees or

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[124] *See* FINAL REPORT, *supra* note 54, at index page.

[125] The permitting process for offshore oil and gas drilling was established fifty years ago. *See* Outer Continental Shelf Lands Act of 1953, 43 U.S.C. § 1340(b) (2000).

[126] *See Meeting #4 Summary*, *supra* note 116, at 1 (presentation of John A. Duff and presentation of Guy R. Martin).

[127] *See* 43 U.S.C. §§ 1331–1356.

[128] *See Meeting #1 Summary*, *supra* note 93, at IV.

other payment schemes.[129] The ongoing regulatory process for Cape Wind is being challenged on a number of fronts, and regardless of whether those suits are successful, they will certainly add cost.[130]

The MTC is convinced that one of the most important actions necessary to advance renewable energy options, in Massachusetts and at the federal level, is to promote and be actively engaged in the timely resolution of these structural and policy deficiencies.

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[129] *See* A Bill to Amend the Outer Continental Shelf Lands Act, H.R. 793, 108th Cong. (2003); A Bill to Promote the Sensible Development of Renewable Energy in the Waters of the Coastal Zone, H.R. 1183, 108th Cong. (2003).

[130] See *Alliance to Protect Nantucket Sound, Inc. v. U.S. Department of the Army*, 288 F. Supp. 2d 64, 80–81 (D. Mass. 2003) for an example from the legal front, and Ebbert, *supra* note 29, at A1, for an example from the public relations front.